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NO. 88-992

IN THE

Supreme Court of the United States

October Term, 1988

DALLAS COUNTY BOARD OF EDUCATION, etc., et al.,
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF SAMSON CRUM, FREDERICK D. REESE, EDWIN MOSS AND CLARENCE WILLIAMS

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No. 88-992

IN THE
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OCTOBER TERM, 1988

DALLAS COUNTY BOARD OF EDUCATION,
etc., et al.

Petitioners,

vs.

UNITED STATES OF AMERICA

Respondent.

On Petition For Writ Of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

Motion For Leave To File Brief Amicus Curiae And Brief In Opposition To Petition For Writ Of Certiorari On Behalf Of Samson Crum, Frederick D. Reese, Edwin Moss And Clarence Williams

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Come now the above listed individuals, by counsel, and move the Court for leave to file a brief, amicus

curiae, in opposition to the petition for writ of certiorari.[1]

Amici are four black citizens of Dallas County, Alabama, who have long been active in civil rights matters in the county, including voter registration, elections, education and employment. Samson Crum, for example, a returning World War II veteran, sought to register twice a month on the two days the voter registrar's office was open during 1945 and 1946. He was unsuccessful. In 1978, after urging the district attorney to prosecute vote fraud, Crum's car was twice shot into.

This case is significant in that it involves the county where the Voting

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1. Because some of the county commission defendants have changed and the status of their attorney has not been decided, counsel for the county commission litigants was not able to consent to the filing of this brief.

Rights Act of 1965 was born, and has resulted in integrated, democratically elected government for this county for the first time since Ulysses S. Grant was president. It is believed that the views of amicus will be beneficial to the Court.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly reversed the district court's order fashioning a remedy for violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 where the district court's plan included an at-large seat for the petitioner school board:

   (a) when the petitioner school board had previously adopted an all single member district method of election;

   (b) where the district court made no determination under Chapman v. Meier, 420 U.S. 1 (1975), Mahan v. Howell, 410 U.S. 315 (1973) and Connor v. Johnson, 402 U.S. 690 (1971) that there existed a singular combination of unique factors justifying an at-large seat.

2. Whether the court of appeals appropriately exercised its discretion in adopting an election remedy to be imple-

mented without delay, when elections for both 1986 and 1988 had previously been stayed.

INTEREST OF AMICUS CURIAE

The interest of amicus curiae is set out in the motion for leave to file this brief, supra.

STATEMENT OF THE CASE

The Dallas County Board of Education seeks review of the court of appeals' remedial order in this decade-old litigation. The judgment of the district court that the at-large elections of the five member school board violated Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 was not appealed.

In 1978, the United States sued the Dallas County Board of Education, hereafter "school board," challenging the at-large method of electing the school board under, inter alia, the Voting Rights Act, 42 U.S.C. § 1973.[1] After the court of

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1. The United States also sued the

appeals twice reversed the district court's determinations that the school board was entitled to a dismissal,[2] the district court entered judgment against the school board under Section 2 of the Voting Rights Act and ordered that the board prepare and file "a fair election plan" with the court and simultaneously seek preclearance of that plan under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. No. 78-578-H, slip op.

Dallas County Commission challenging its method of election. Though the two defendants were severed on motion of the school board, No. 78-578-H (S.D. Ala. Jan. 15, 1986), JSA-64, they remained connected. The school board and county commission jointly filed the petition for writ of certiorari.

Subsequent to the filing of the petition, the county commission has voted to withdraw its petition. This brief will address issues related to the school board.

2. 739 F.2d 1529 (11th Cir. 1984); 791 F.2d 831 (11th Cir. 1986).

5,6 (S.D. Ala. Feb. 11, 1987).

The school board did not appeal, and proceeded to adopt an all single member method of election with a five single member district plan. Proposed Plan of Election for the Dallas County Board of Education (filed Mar. 31, 1987). The Attorney General determined that the method of election was not objectionable, but did object to the particular plan selected by the school board because it over-concentrated black citizens in one district and fragmented a black community between two other districts. Letter of June 1, 1987 from Wm. Bradford Reynolds, Assistant Attorney General, to School Board.

In the severed part of the litigation concerning the county commission, the court had also found a Section 2 violation.[3] Because the county commission had been unable to secure

preclearance from the Attorney General of the plan it adopted, the district court fashioned its own plan, which consisted of four single member districts, and retained the at-large election of the probate judge who served on the county commission ex officio.[4]

After adopting that plan for the county commission, the district court notified the school board and the United States that it proposed to adopt the same plan for the school board, though it recognized "that the same unique circumstances which rendered the [court's plan for the county commission] a fair election plan with respect to the Dallas County Commission do not exist with respect to the Dallas County Board of

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3. 636 F.Supp. 704 (S.D. Ala. 1986).

4. 661 F.Supp. 955 (S.D. Ala. 1987).

Education." No. 78-578-H, slip op. 3 (S.D. Ala. Sept. 18, 1987), JSA-59. The lack of "unique circumstance" was that the school board had no member comparable to a probate judge, a county wide officer with duties unrelated to the commission. The district court noted, however, that the United States had desired that the county commission and the school board be elected from the same districts. Ibid.[5]

An evidentiary hearing was held at which testimony was taken regarding the court's plan. The United States called witnesses to testify regarding two five

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5. The United States made that argument in support of a five district plan for the county commission when no rationale for an at-large seat for the school board existed. The district court adopted a four/one plan for the county commission first, and in a classic Catch-22, used that to justify the same plan for the school board to avoid "voter confusion and administrative difficulties." JSA-11.

single member district plans. Hearing o October 2, 1987. The district court rejected those plans, JSA-11 through 13, and adopted its county commission plan with its at-large seat for the school board, concluding that this plan was "a fair election plan for the Dallas County School Board." JSA-11.

The opinion of the district court adopting this plan did not discuss the standards applicable when a federal cour fashions a districting plan. It did not articulate any singular combination of unique factors requiring the utilization of an at-large position, Chapman v. Meie 420 U.S. 1, 21 (1975), did not discuss any rationale for ignoring the school board's choice of having five single member districts, White v. Weiser, 412 U.S. 783, 705 (1973), and did not discus why it did not limit its modification of the school board's plan to those parts

objected to by the Attorney General, Upham v. Seamon, 456 U.S. 37, 43 (1982).

The court of appeals reversed. It did not merely find the district court's plan was inadequate to remedy the violation, but held "[t]he district court's proposed election plan does not comply with Section 2 of the Voting Rights Act of 1965..." JSA-34.

After reciting the evidence that led the district court to find a violation, the court of appeals concluded:

> If anything, the district court's election plan, which calls for an at-large election of the fifth member to the School Board, perpetuates rather than ameliorates the inequities which have resulted in an abridgement of Dallas County's black citizens' access to the political process.

JSA-34.

The court of appeals reviewed the record of the five single member district plan drafted by Dr. Allan J. Lichtman, JSA-34 through 38, and concluded that it

would "vindicate[] the rights of Dallas County's black citizens whose opportunity to effectively participate in the election process has been denied." JSA-38. The court of appeals vacated and remanded with direction that the Lichtman plan be implemented in accordance with state law in time for the general election in November, 1988. JSA-38.

THE QUESTIONS PRESENTED BY THE PETITION ARE NOT SUBSTANTIAL

Argument

I. The Decision Vacating the District Court's Order Which Reintroduced An At-Large Seat Was Proper.

Petitioner school board argues that the court of appeals violated the clearly erroneous rule, Rule 52(a), F.R.Civ.P. in determining that the district court's plan did not remedy the Section 2 violation. The difference between the rulings of the two courts below was not one of

fact. The difference was that the district court found that reintroducing an at-large seat for the school board was "a fair election plan." JSA-11. The court of appeals relied upon the facts found by the district court. It noted that evidence introduced at the hearing on the plans "reveals that many of the concerns which prompted our remand of this case in 1984 continue to exist." JSA-31. It concluded that the district court's plan itself violated the Voting Rights Act, perpetuating the abridgement of black citizens' elective franchise. JSA-34. Properly rejecting this outcome, the court of appeals noted that "any proposal to remedy a Section 2 violation must itself conform with Section 2." JSA-29, quoting Dillard v. Crenshaw County, 831 F.2d 246, 249 (11th Cir. 1987).

The opinion of the court of appeals that the district court erred in adopting

an at-large seat is correct for additional reasons. First the district court ignored the decisions of this court holding that "in fashioning apportionment remedies, the use of single-member districts is preferred," Mahan v. Howell, 410 U.S. 315, 333 (1973), "[u]nless the District Court can articulate a 'singular combination of unique factors'" that justifies a different result. Chapman v. Meier, 420 U.S. 1, 21 (1975). Connor v. Johnson, 402 U.S. 690 (1971).

Second, this Court has held that in apportionment matters, federal courts "should follow the policies and preferences of the State...whenever adherence to state policy does not detract from the requirements of the Federal Constitution..." White v. Weiser, 412 U.S. 783, 795 (1973) Coupled with this, this Court has held that objection to part of an election plan by the Attorney General

does not give a federal court authority to modify the precleared part of the plan. Upham v. Seamon, 456 U.S. 37, 43 (1982). Here the method of election adopted by the school board and precleared by the Attorney General had no at-large seat. When the district court reintroduced an at-large seat, the school board was placed in the untenable position of defending a court ordered plan which ignored its own decision to adopt all single member districts. The school board has not attempted to explain, much less justify, the district court's decision to ignore the school board's valid, precleared policy choice.

II. The Decision of the Court of Appeals To Implement a Remedy Without Delay Was Proper Where the Last Two Elections had Been Enjoined and the Litigation Had Taken Ten Years.

The school board contends that the court of appeals erred in adopting a

remedial plan without remanding for a hearing to determine whether the plan conformed to Section 2 standards. This is not an argument meriting review by this Court, primarily because an evidentiary hearing was held at which the plan adopted was examined. The school board's real complaint is that it came unprepared to that hearing.

A. A Hearing Was Held on the Plan Adopted by the Court of Appeals.

When the district court notified the parties that it proposed to adopt the county commission plan for the school board, it ordered "that an evidentiary hearing be conducted...for the purpose of addressing the parties' objections, if any, to the Court's proposal. JSA-60.

At that hearing when the United States began offering evidence, counsel for the school board stated "I did not understand that this hearing would be an

evidentiary hearing..." (Transcript of Oct. 2, 1987, 4.) When the district court asked counsel for the school board what testimony he would expect to offer, counsel replied, "We have no testimony to offer." Ibid., 5.

Two witnesses testified at that hearing. One was Allan J. Lichtman, who drafted the plan the court of appeals ordered implemented. Counsel for the school board cross examined Lichtman (Transcript of Oct. 2, 1987, 45-59). School board counsel particularly sought to probe Lichtman's opinion that the school board's plan was not racially fair by asking Lichtman to contrast it to the plan he devised. Ibid., 46. School board counsel and the trial judge asked Lichtman a number of questions covering a range of election issues during that cross examination. But after asking Lichtman to contrast a 61 percent black

district that he drew to an at-large seat, defense counsel had no more questions regarding the particulars of the Lichtman plan, nor whether the plan met the requirements of the fourteenth amendment and Section 2 of the Voting Rights Act. Ibid.

The school board had the opportunity to cross examine the authors of the two five single member district plans. The district court discussed details of the Lichtman plan and the other plan and rejected them. JSA-12, 13.

After determining that the plan fashioned by the district court was an inadequate remedy, the court of appeals turned to the evidentiary record JSA-34 through 38, and determined that the Lichtman plan was an appropriate remedy for the violation. Noting that it would ordinarily remand to the district court with directions to implement an election

plan which fully complies with Section 2, JSA-37, the court of appeals concluded there was no need for further proceedings because the record already contained the Lichtman plan as an adequate remedy. JSA-38. It noted that "the School Board has had ample opportunity to devise an election plan which cures the section 2 violation." JSA-37. Accordingly, it ordered the Lichtman plan implemented in accordance with state and local laws. JSA-38.

B. The Record of this Litigation Justified the Court of Appeals Taking Efforts to End the Delay in Holding Elections.

On October 18, 1988, ten years to the day after this litigation began, the district court signed an order setting a special election schedule for the Dallas County School Board. This order came after the court of appeals had twice reversed the district court's conclusions

that the school board had prevailed on the merits, had directed that the district court enter a preliminary injunction, had reversed the remedy adopted by the district court, had ordered the district court to implement a specific plan, and had rejected the motion filed by the district court for clarification of the mandate on remedy. Additionally, elections had not been held in 1986 and the June 1988 primaries had been stayed.

It is against this history that the decision of the court of appeals to select a plan from the record, order it implemented, and hold primaries in time for the general election in November, 1988, must be assessed.

Petitioners do not question the authority of the court of appeals to issue a specific mandate. The court of appeals did not issue an injunction, but followed the practice of the circuit,

when time and circumstances require, of framing the injunction and directing that this be made the order of the district court. Davis v. Board of School Commissioners of Mobile County, 322 F.2d 356, 359 (5th Cir.) cert. den. 375 U.S. 894 (1963).[6]

The court of appeals faced a compelling situation. No elections had been held for the school board since 1984. There was time, when the court of appeals acted on July 13, 1988, to hold primaries prior to the November general election. A primary concern of the court of appeals was that the delay in holding elections cease. The court was aware of

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6. Even were there defects in the plan chosen, the court acted properly in fashioning this relief. A federal court may properly adhere to the general election timetable even if there were legal errors in its plan. Upham v. Seamon, 456 U.S. 35 (1982).

the history of the litigation. Acknowledging that it would ordinarily remand for consideration of remedy, JSA-37, the court of appeals elected to exercise its equitable powers to assure relief.

> Because of this lawsuit, all the citizens of Dallas County have been denied the right to govern their affairs. How long may a court of the United States allow the rights of citizens to be trampled through pre-clearance defaults and litigation plans? It is time for an election in Dallas County!

JSA-38.

Subsequent events verified court of appeals' concern over delay, and the likelihood of further delay. Though the court of appeals ordered that primaries be held in time to hold the general election in November, JSA-40, the efforts to implement that mandate were slow. The district court ordered the United States to file a proposed election schedule within one day, and the United States did

so. But the district court then filed its own motion for clarification of the mandate. JSA-66. The court of appeals quickly rejected this motion save to modify its mandate to allow the elections to be concluded by December 31, 1988. JSA-63.

Counsel for the defendant election official in charge of conducting elections waited until October 6, 1988 to write seeking permission to formulate a schedule. Letter of Oct. 6, 1988 from Cartledge Blackwell to Judge W.B. Hand. The district court allowed this request, and did not enter an order setting the election until October 18, 1988, a date which made it a practical impossibility to utilize the general election date, with its expected high voter turnout, for any of the special election dates. The court set the primary, run-off and general elections beginning the Tuesday

before Thanksgiving and ending the Tuesday after Christmas. No. 78-578-H (S.D. Ala. Oct. 18, 1988).

Those elections have now been held, and on the Martin Luther King holiday, January 16, 1989, integrated government came to Dallas County for the first time since Ulysses S. Grant was president. That would not have happened if the court of appeals had not exercised its authority to implement relief.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari does not present issues meriting review and should be denied.

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